Supreme Court, U. S.
FILED
JUL 20 1976
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term 1975

No. 75-1255

JAMES E. DOUGLAS, JR.

Appellant,

v.

SEACOAST PRODUCTS, INC., et al.,

Appellees

On Appeal from the United States District Court for the Eastern District of Virginia

BRIEF AMICI CURIAE ON THE MERITS

JOSEPH E. BRENNAN
Attorney General of Maine

EDWARD F. BRADLEY, JR.
Assistant Attorney General

DAVID H. SOUTER
Attorney General of New Hampshire

DONALD W. STEVER, JR.
Assistant Attorney General

JULIUS C. MICHAELSON
Attorney General of Rhode Island

TABLE OF CONTENTS

Page

INTERESTS OF THE AMICI CURIAE 1

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

QUESTIONS PRESENTED 2

STATEMENT 2

ARGUMENT 2

I. The Equal Protection Clause Does Not Prohibit the Exclusion of Non Resident Fishing in the States Internal Waters 2

II. The Lower Court Erroneously Concluded That the Bartlett Act Preempted State Control of Commercial Sea Fisheries 3

TABLE OF AUTHORITIES

CASES

Louisiana v. Mississippi, 202 U.S. 1, (1906) 3

McCready v. Virginia, 90 U.S. 391 (1876) 3

Pollard's Lessee v. Hagan, 44 U.S. 212 (1845) 3

Skiriotes v. Florida, 313 U.S. 69 (1941) 4

Smith v. Maryland, 59 U.S. 71 (1855) 3

Toomer v. Witsell, 334 U.S. 385 (1948) 4

Traux v. Raich, 239 U.S. 33 (1915) 3

U. S. v. Alaska, 442 U.S. 184 (1975) 2

U. S. v. California, 332 U.S. 18 (1947) 3

U. S. v. Texas, 339 U.S. 707 (1950) 3

FEDERAL STATUTES

	Page
28 U.S.C. 2284	1
28 U.S.C. 1253	1
16 U.S.C. 971	5
16 U.S.C. § 1081 *et seq.*	2, 5
16 U.S.C. 1091	5
16 U.S.C. 1094	5
43 U.S.C. 1301 *et seq.*	3, 4
43 U.S.C. 1311	5
16 U.S.C. 1801	6
16 U.S.C. 1856	6
16 U.S.C. 1881	6

STATE STATUES

Code of Virginia

28.1-81.1	1, 2, 3, 4
28.1-60	1, 2

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BRIEF AMICI CURIAE ON THE MERITS

INTEREST OF AMICI CURIAE

The interests of the Amici Curiae are set out in the Brief Amicus Curiae in Support Of Statement As To Jurisdiction filed by the State of Maine.

OPINION BELOW

The opinion below was entered by a three-judge court for the Eastern District of Virginia on November 1, 1975. It is not yet reported.

JURISDICTION

A final order granting an injunction against the enforcement of §§ 28.1-60 and 28.1-81.1 of the Code of Virginia of 1950, as amended, was entered on November 7, 1975 by a three-judge district court convened under 28 U.S.C. § 2284. The jurisdiction of this Court rests on 28 U.S.C. § 1253. This Court noted probable jurisdiction of this appeal on April 26, 1975.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution involved are the Supremacy Clause, Article VI, Cl. 2 and the Equal Protection Clause Amendment XIV Sec. 1.

QUESTIONS PRESENTED

Whether a state statute which prohibits non residents from fishing stocks concentrated in internal waters violates the Equal Protection Clause of the Fourteenth Amendment.

Whether the Bartlett Act, 16 U.S.C. § 1081 et seq, preempts state regulation of domestic sea fisheries within its marine boundaries.

STATEMENT

The three judge court held that Section 28.1-60 of the Virginia Code violates the Equal Protection Clause and enjoined Virginia's exclusion of non-residents fishing in internal waters.

The lower court also held that the Bartlett Act, 16 U.S.C. 1081 *et seq.*, preempted 28.1-81-1 of the Virginia Code as well as "Virginia's control of commercial sea fisheries and supersedes state regulation of them".

ARGUMENT

I. The Equal Protection Clause Does Not Prohibit the Exclusion of Non Resident Fishing in the States Internal Waters.

The states submitting this brief do not specifically exclude alien fishing within their coastal waters. The sole objection of each state is that the lower court erroneously declared Virginia Code 28.1-60 violative of the equal protection clause. The Virginia statute prohibits non residents from fishing in Chesapeake Bay which is historic internal waters of the United States. *U. S. v. Alaska*, 422 US 184, 155 (1975). Within internal waters, the state owns and exercises jurisdiction over the seabed and subsoil. *Pollard's Lessee v. Hagan*, 44 U.S. 212 (1945); *U. S. v. California*, 332 U.S. 19, 30 (1947); *U. S. v. Texas*, 339 U.S. 707, 717 (1950). In *Smith v. Maryland*, 59 U.S. 71 (1855), the states' ownership of fish within internal waters was recognized. In *McCready v. Virginia*, 94 U.S. 391 (1876), the Court held that property rights in free swimming fish in inland waters belonged to people of the state in their united sovereignty and could be appropriated to them by the state's exclusion of non residents. Subsequently, the Court affirmed the state's right to exclude non citizens from fishing within its waters. *Louisiana v. Mississippi*, 202 U.S. 1, 52 (1906).[1] *Traux v. Raich*, 239 U.S. 33, 39-40 (1915). These decisions specifically uphold Virginia's right to exclude non residents from internal waters. While non residents in *McCready* sought to invoke the privileges and immunities clause, the court's reasoning applies equally to the lower court's application of the equal protection clause in this case. In *McCready*, the Court held that non residents are not invested with any interest in the common property of the citizens of another state. Since non residents do not possess even a threshold interest in the state's allocation of internal water fisheries, they have no right which can be protected by the constitutional provision upon which they have relied.

II. The Lower Court Erroneously Concluded That the Bartlett Act Preempted State Control of Commercial Sea Fisheries.

The District Court found that the Bartlett Act, 16 USC 1081, preempted Virginia Code 28.1-81.1. The

[1] For purposes of this decision, the Court assumed the states owned the territorial sea. This assumption was altered by the decision in *U. S. v. California*, 332 U.S. 19 (1947) which limited state ownership to internal waters. Subsequently, the Submerged Lands Act extended state ownership to the territorial sea. 43 USC 1301 *et seq.*

Bartlett Act prohibits all vessels except vessels of the United States from fishing in the territorial waters of the United States or in any waters where the United States has the same right with respect to the fisheries as it has in the territorial sea. Since the United States has the same right with respect to the fisheries in internal waters as it has in the territorial sea, the Bartlett Act operates to exclude foreign flag vessels in both zones of maritime jurisdiction. The Virginia statute, 28.1-81.1, prohibits licensing of persons, firms, partnerships and associations which are not citizens of the United States and of corporations which are not at least 75 percent owned by United States citizens.

The sole objection to the lower court's decision is the unnecessary but seriously adverse holding that the Bartlett Act preempted Virginia's control of commercial sea fisheries and superseded state regulation of them. Since this statement was made in the context of preemption of the state's alien corporation law, it is unclear whether the Court intended to extend this holding to preemption of state control and regulation of domestic sea fisheries. Nonetheless, the consequences of that extension, if intended, would be so severe we must oppose it.

The states authority to regulate fisheries in inland waters and the territorial sea is well established. *Skiriotes v. Florida*, 313 U.S. 69, 75 (1941); *Toomer v. Witsell*, 334 U.S. 385, 393 (1948). While upholding state jurisdiction in these cases, the Court indicated that state management was subject to preemption by legislation establishing federal management of specific fisheries. However, in 1953, Congress passed the Submerged Lands Act, 43 USC 1301 *et seq.*, which established the Federal government's intention to leave the subject of domestic fisheries management exclusively to the states within the area of territorial sea and inland waters contained within state boundaries. The Act provides:

> "1311 (a) It is determined and declared to be in the public interest that (2) the right and power to manage, administer, lease, develop, and use said lands and natural resources all in accordance with applicable state law be and they are subject to the provisions hereof recognized, confirmed, established, invested and assigned to the respective states . . . ."

No further federal legislation even arguably affecting state authority to manage domestic fisheries was passed prior to passage of the Bartlett Act in 1964. The Bartlett Act recognized the state interest in the fisheries by requiring state concurrence prior to authorization of any foreign vessels to fish in the territorial sea of the United States, 16 USC 1081. Two years later, the states jurisdiction in the territorial sea was expressly affirmed by the Contiguous Fisheries Zone Act, 16 USC 1091 which extended the prohibition of foreign fishing nine miles seaward of the territorial sea. In relevant part, the Act declared:

> "Nothing in this chapter shall be construed as diminishing their [the states] jurisdiction to such resources beneath and in the waters of the territorial seas of the United States." 16 USC 1094.

Subsequent federal legislation has also confirmed state authority to regulate the fisheries in internal and territorial waters. The Atlantic Tunas Convention Act, 16 USC 971, specifically affirms the priority of state management authority within the territorial sea by prohibiting federal regulations from taking effect in that area unless the state has refused to enforce regulations which will achieve the objectives imposed on the states by international agreement. Under this Act, the federal government can not preempt state control and regulation of the tuna fishery in the territorial sea unless the state regulations for conserving the fishery are insufficient. 16 USC 971g (d). Had the Bartlett Act preempted state authority to regulate tuna, as the lower court concluded, Congress would not have shown such deference for state authority. The

Fisheries Conservation and Management Act of 1976, 16 USC 1801, also established the states right to manage the coastal fisheries in the territorial sea. The Act provides that nothing in this Act shall be construed as extending or diminishing the jurisdiction of authority of any state within its boundaries unless, after hearing, the Secretary of Commerce finds that fishing in a fishery covered by a management plan occurs predominantly within the fishery conservation zone and that the state has taken or not taken action which will substantially and adversely affect the fisheries management plan. 16 USC 1856.

The provisions of subsequent legislation demonstrate that the Bartlett Act did not preempt state fisheries management authority in the territorial sea or inland waters. Any remaining uncertainty about the impact of the Bartlett Act upon state regulatory authority is finally resolved by the repeal provisions of the Fisheries Conservation and Management Act. Because the Bartlett Act is repealed by the Fisheries Act, 16 USC 1881, a failure to reverse or limit the lower court's position with respect to state fisheries management authority will leave all coastal fisheries at least temporarily unmanaged and some of only local distribution permanently unmanaged.

For all these reasons, the lower court's decision that the Bartlett Act preempted state control of commercial sea fisheries is erroneous and should be reversed.

Respectfully submitted,

JOSEPH E. BRENNAN
Attorney General of Maine

EDWARD F. BRADLEY, JR.
Assistant Attorney General

DAVID H. SOUTER
Attorney General of New Hampshire

DONALD W. STEVER, JR.
Assistant Attorney General

JULIUS C. MICHAELSON
Attorney General of Rhode Island